

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-2043

To be argued by  
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

Docket No. 76-2043

---

ROOSEVELT C. BENTLEY,  
  
Petitioner-Appellant,  
  
-against-  
  
ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility, Auburn,  
New York,  
  
Respondent-Appellant.

---

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK  
DENYING A WRIT OF HABEAS CORPUS

---

---

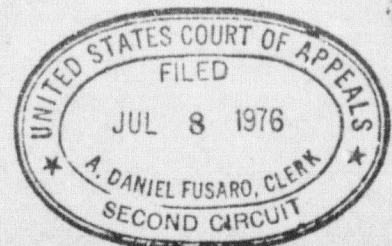
BRIEF FOR RESPONDENT-APPELLEE

---

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondent-  
Appellee  
Office & P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-3447

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

DAVID L. BIRCH  
Assistant Attorney General  
of Counsel



## TABLE OF CONTENTS

---

	<u>PAGE</u>
Preliminary Statement.....	1
Question Presented.....	2
Statment of Facts.....	2
ARGUMENT - PETITIONER HAS BEEN PROPERLY DENIED A HEARING ON THE ISSUE OF WHETHER HE WAS COMPETENT TO PLEAD GUILTY SINCE HE PRESENTED NO EVIDENCE THAT HE WAS INCOM- PETENT AT THE TIME HE ENTERED HIS PLEA.....	6
Conclusion.....	17

# TABLE OF CASES

	<u>PAGE</u>
<u>Commonwealth v. Melton,</u> ___ Pa. ___ 351 A. 2d 221 (1976).....	11
<u>Commonwealth v. Miller,</u> ___ Pa. ___ 309 A. 2d 705 (1973).....	11
<u>Cooper v. Griffin,</u> 455 F. 2d 1142 (5th Cir. 1972).....	11, 12
<u>Crail v. United States,</u> 430 F. 2d 459 (10th Cir. 1970).....	16
<u>Drope v. Missouri,</u> 420 U.S. 162 (1975).....	6, 12
<u>Dusky v. United States,</u> 362 U.S. 402 (1959).....	13
<u>Greenwood v. United States,</u> 350 U.S. 366, 375 (1956).....	16
<u>Henderson v. Morgan,</u> ___ U.S. ___, 44 U.S.L.W. ___, (June 17, 1976).....	11
<u>Jordan v. Wainwright,</u> 457 F. 2d 338 (5th Cir. 1972).....	8
<u>Malinauska v. United States,</u> 505 F. 2d 649 (5th Cir. 1974).....	16
<u>O'Neil v. United States,</u> 486 F. 2d 1034 (2d Cir., 1973).....	9

	<u>PAGE</u>
<u>Pate v. Robinson,</u> 383 U.S. 375 (1966).....	6
<u>Saddler v. United States,</u> 531 F. 2d 83 (2d Cir., 1976).....	7, 12, 15
<u>Sieling v. Eyman</u> 478 F. 2d 211 (6th Cir. 1973).....	12, 14, 15
<u>Splitt v. United States,</u> 364 F. 2d 594 (6th Cir. 1966), cert. den. 385 U.S. 1019.....	15
<u>United States ex rel. Brook v.</u> <u>LaVallee, 306 F. Supp. 159</u> (SDNY 1969).....	12
<u>United States ex rel. Curtis v.</u> <u>Zelker, 466 F. 2d 1092</u> (2d Cir. 1972) at 1096 n. 8.....	12
<u>United States ex rel. Evans v.</u> <u>LaVallee, 466 F. 2d 782, 786</u> (2d Cir. 1971).....	8
<u>United States ex rel. Johnson v.</u> <u>Brierley, 334 F. Supp. 661</u> (E.D. Pa. 1971).....	10
<u>United States ex rel. Lynch v.</u> <u>Fay, 184 F. Supp. 227 (SDNY)</u> app. dsmd. 284 F. 2d 301 (2d Cir. 1960).....	11
<u>United States ex rel. McGouch v.</u> <u>Hewitt, 528 F. 2d 339 (3d Cir.</u> 1975) at 342, n. 3.....	16
<u>United States ex rel. Putman v.</u> <u>Henderson, 525 F. 2d 683</u> (2d Cir. 1975).....	13

	<u>PAGE</u>
<u>United States ex rel. Rizzi v.</u> <u>Follette</u> , 367 F. 2d 559 (2d Cir. 1966).....	12
<u>United States ex rel. Rosen v.</u> <u>Follette</u> , 409 F. 2d 1042 (2d Cir. 1969) cert. <u>den.</u> 398 U.S. 930 (1970).....	12
<u>United States v. Betterhausen</u> , 499 F. 2d 1223 (10th Cir. 1974).....	16
<u>United States v. Harlan</u> , 480 F. 2d 215 (6th Cir. 1973).....	16
<u>United States v. Marshall</u> , 458 F. 2d 446 (2d Cir., 1972).....	8
<u>United States v. Mercado</u> , 469 F. 2d 1148 (2d Cir. 1972).....	13
<u>United States v. Miranda</u> , 437 F. 2d 1255 (2d Cir. 1971).....	9
<u>United States v. Reed</u> , 285 F. Supp. 738 (D.C. D.C. 1968).....	10
<u>United States v. Valentino</u> , 283 F. 2d 634 (2d Cir. 1960).....	13
<u>Westbrook v. Arizona</u> , 384 U.S. 150.....	14
<u>Wolf v. United States</u> , 443 (10th Cir. 1970).....	16

#### STATUTES

New York Code of Criminal Procedures § 662...	13
New York Criminal Procedure Law § 703.10.....	13
18 U.S.C. § 4244.....	13

PAGE

OTHER AUTHORITIES

Note, Competence to Plead Guilty: A New Standard, 74 Duke Law Journal 149.....	13, 17
---	--------

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

Docket No. 76-2043

---

ROOSEVELT C. BENTLEY,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility, Auburn,  
New York,

Respondent-Appellant.

---

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK  
DENYING A WRIT OF HABEAS CORPUS

---

---

BRIEF FOR RESPONDENT-APPELLEE

---

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Motley, J.) entered January 28, 1976 denying, without a hearing, appellant's petition for a writ of habeas corpus. The District Court granted a certificate of probable cause on April 16, 1976.

### Question Presented

1. Was petitioner properly denied a hearing on the issue of whether he was competent to plead guilty since he has presented no evidence that he was incompetent at the time he entered his plea?

### Statement of Facts

Petitioner is presently incarcerated in the Ossining Correctional Facility, Ossining, New York pursuant to a judgment of conviction rendered in Supreme Court, Bronx County (Prust, J.) on a plea of guilty to the crimes of possession of a weapon as a felony and criminal possession of a dangerous weapon.\* The plea was entered after the denial of a motion to suppress. Petitioner was sentenced on April 24, 1970 to concurrent terms of up to seven years on each conviction. The judgment of conviction and a denial of an application for

---

\* The Minutes of plea are annexed to the appellant's Appendix, Part D.

a writ of error coram nobis\* were unanimously affirmed without opinion, 38 A D 2d 690 (1st Dept., 1971). Leave to appeal to the New York Court of Appeals was denied on August 7, 1972.

Petitioner was paroled on December 20, 1973 pursuant to New York City and Federal detainer warrants. On February 3, 1975 he pleaded guilty to disorderly conduct in the Bronx Criminal Court and was fined \$100. Petitioner's parole was revoked. His present maximum expiration date in January 2, 1977.

Petitioner raised his instant claim of alleged mental incompetence at the time of plea in a second coram nobis proceeding. The motion was denied on August 4, 1972 (Silverman, J.)\*\*. Leave to appeal to the Appellate Division was denied on October 31, 1972.

On April 24, 1973, petitioner filed the instant action pro se. Petitioner alleged, as he had before Justice Silverman, that a report dated March 2, 1971 made by Dr. Stanley Portnow, a psychiatrist at Bellevue Hospital,

\* Petitioner claimed in this coram nobis application that his plea was not a knowledgeable waiver by him of his constitutional rights since he was ignorant of the relevant law and range of sentence at the time of his plea.

\*\* A copy of the decision is annexed hereto as Appendix "1".

and addressed to Mrs. Gussie Kleinman, an attorney representing petitioner in a federal action, demonstrated that he was mentally retarded and therefore incompetent to plead guilty.

By order dated November 19, 1974, the District Court appointed Professor Graham Hughes, Esq. of New York University Law School to represent petitioner. In a memorandum opinion and order dated January 28, 1976, Judge Motley denied the petition on the ground that he had presented no evidence that he was incompetent to plead guilty.

The report of Dr. Portnow, dated March 2, 1971, on which petitioner based his claim of incompetence in his second state coram nobis petition and the District Court was prepared pursuant to the request of his attorney and Judge Motley in a federal criminal proceeding, Complaint Number 69-0463. That complaint was dismissed on March 17, 1972.

Another Federal indictment, Docket Number, 70 Crim. 250, was filed against petitioner on April 9, 1970.\* An order to examine petitioner in connection with that action was filed May 31, 1971. Petitioner pleaded guilty to unlawfully failing to make an income tax return for 1963 on May 16, 1972 in

---

\* The docket entries in that proceeding are annexed hereto as Appendix "2".

the United States District Court for the Southern District  
(Edelstein, J.) and was sentenced to six months imprisonment.

Dr. Portnow's report dated March 2, 1971 (Appellant's Appendix "E") states that petitioner denied "any history of mental illness or any psychiatric intervention in the past." Petitioner stated that he had been in the Air Force and had received an honorable discharge. Dr. Portnow concluded that petitioner was "suffering from a moderate degree of mental retardation and suggested that a "[p]sychological test should be performed to determine the patient's intelligence quotient."

Such testing was performed at Ossining Correctional Facility on June 29, 1970 (see Appellant's Appendix "F"). The tests indicated that petitioner has a composite intelligent quotient of 74; that petitioner's "intelligence rating is borderline defective" which is "a level of intellectual function above that of retarded person." The psychologist who gave petitioner the tests also stated that petitioner had completed ten grades of school.

### ARGUMENT

PETITIONER HAS BEEN PROPERLY  
DENIED A HEARING ON THE ISSUE  
OF WHETHER HE WAS COMPETENT TO  
PLEAD GUILTY SINCE HE PRESENTED  
NO EVIDENCE THAT HE WAS INCOM-  
PETENT AT THE TIME HE ENTERED  
HIS PLEA

Petitioner conceded in the District Court that no evidence was presented to Justice Brust, when petitioner entered his guilty plea, to indicate that petitioner might be incompetent to plead guilty. (Brief of Professor Hughes, p. 2).

Petitioner argues that Dr. Portnow's report, the sole evidence he presented to the State court on a second coram nobis petition and which he presented to the Court below, was sufficient to require a competency hearing before the District Court. His claim is without merit.\*

---

\* Petitioner argues that the evidence before the District Court was sufficient to require a competency hearing. His right under the due process clause of the Fourteenth Amendment is to have the state trial court not convict him while he is incompetent, see Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). His right to a competency hearing is a right that must be had before the state court.

The case law concerns allegations that a trial court erroneously denied an accused the right to a competency hearing. Petitioner admittedly presented no evidence to the state trial court that would have indicated that he was entitled to a competency hearing. The standard which governs a trial court or a court which accepts a plea presumably applies to the Court which petitioner claims, improperly denied him a competency hearing, the federal district court.

The most recent case from this Circuit delineating a court's requirement to hold a competency hearing is Saddler v. United States, 531 F. 2d 83 (2d Cir., 1976). Under Saddler, the judge must have "reasonable grounds to doubt the defendant's competence" 531 F. 2d at 86 (Defendant had history of mental illness and repeated hospitalizations for mental illness, had attempted suicide, and was so incoherent that his attorney could not converse with him. He was unresponsive and had irrational answers to the Court's inquiries).

The "reasonable ground" standard was stated previously by this Court in United States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972) where the Court stated that a competency hearing is not required where "the evidence does not warrant one", and where there is no "'reasonable ground' for believing that [the accused] is incompetent." 455 F. 2d at 1108.

In Roth, notwithstanding that the defendant had murdered a ten year old girl in the course of an attempted rape and had a history of mental disturbance including schizophrenia, this Court found that the Court that took his guilty plea properly did not make a fresh inquiry into his competence.

A competency hearing is not required "no matter what the evidence is", United States ex rel. Evans v. LaVallee, 446 F. 2d 782, 786 (2d Cir. 1971) or where there is no "bona fide doubt" about the accused's sanity, Jordan v. Wainwright, 457 F. 2d 338 (5th Cir. 1972), but only where there is "reasonable cause" to believe the defendant is mentally ill, United States v. Marshall, 458 F. 2d 446 (2d Cir., 1972).

In United States v. Miranda, 437 F. 2d 1255 (2d Cir. 1971), where the defendant had suffered severe narcotic withdrawal, had received drugs for the withdrawal and had attempted suicide before he had entered the plea, the Court explained:

"The general consensus of the courts which have considered the issue, therefore, seems to be where no evidentiary facts are alleged to support a bald allegation of mental incompetence, a hearing may not be required. On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required." (citations omitted) 437 F. 2d at 1258.

O'Neil v. United States, 486 F. 2d 1034 (2d Cir., 1973) requires that only where there is detailed and controverted issues of fact should a District Court hold an evidentiary hearing on a motion pursuant to 28 U.S.C. § 2255. In O'Neil, counsel on appeal for the first time presented hospital and other reports indicating that the defendant had been treated before and after trial for withdrawal symptoms, so the Court suggested filing a new petition in the District Court.

The only evidence petitioner has presented here, notwithstanding the fact that he was represented below by counsel, is a psychiatric report that stated he was of "limited intelligence," that he denied a history of mental illness,

that he had "no marked anxiety, depression or paranoid ideation" that his judgment is "grossly impaired" (because of his interpretation of one proverb and his answer to what he would do if he saw fire in a movie house) that he had been honorably discharged from the air force, that he had "a moderate degree of mental retardation" and which concluded with the suggestion that his intelligence quotient should be measured by psychological test.

Eight months prior to that report and three months after pleading guilty, that recommended testing had been performed. Petitioner was found to have a composite intelligence quotient of 74 which places him above that of a retarded person (see Appellant's Appendix "F").

There was no conflicting evidence before the Court below. The two reports did not contradict each other. The psychologist's report had carried forth the instructions of the psychiatrists. It found that petitioner was not retarded.

"[L]ow intelligence level does not establish incompetency." United States ex rel. Johnson v. Brierley, 334 F. Supp. 661 (E.D. Pa. 1971). In United States v. Reed, 285 F. Supp. 738 (D.C. D.C. 1968), a twenty year old with an

IQ between 65 and 70 who was semi-literate was found competent to stand trial.

In Commonwealth v. Melton, \_\_\_ Pa. \_\_\_ 351 A. 2d 221 (1976) where the defendant claimed his guilty plea was a nullity because of an IQ of 69 and the mental age of an 8 or 9 year old, the Court stated there was nothing to establish that the defendant lacked the "ability to think intellectually in any degree. Similarly, in Commonwealth v. Miller, \_\_\_ Pa. \_\_\_ 309 A. 2d 705 (1973), where the defendant had an IQ of 75, the Court found the defendant had pleaded guilty knowingly.

In United States ex rel. Lynch v. Fay, 184 F. Supp. 277 (SDNY) app. dsmd. 284 F. 2d 301 (2d Cir. 1960), where the petitioner had an IQ of 74, the court held that the proper manner in which the State court should have proceeded would have been to appoint counsel for the accused. Petitioner here had that safeguard.\*

Thus, petitioner's claim that the retarded cannot intelligently plead guilty is utterly without support. His only authority for that claim is Cooper v. Griffin, 455 F. 2d 1142 (5th Cir., 1972) which held that two boys with an IQ range

\* In Henderson v. Morgan, \_\_\_ U.S. \_\_\_, 44 U.S.L.W. \_\_\_, (June 17, 1976), where the respondent had an IQ between 68 and 72, there was no suggestion that a guilty plea from him under the proper circumstances could not be voluntary and intelligent.

between 61 and 67 could not waive their Miranda rights. The obvious implication of Cooper is that Miranda should have followed and counsel appointed.

Petitioner's attorney at plea could have provided "significant and probative" evidence about petitioner's competency, United States ex rel. Roth v. Zelker, supra; United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972) at 1096, n. 8 and could be expected to bring the competency into focus, see Drope v. Missouri, supra, 402 U.S. at 137. Petitioner's failure to submit an affidavit from the attorney who represented him at his plea must weigh heavily against him, United States ex rel. Brock v. LaVallee, 306 F. Supp. 159 (SDNY 1969); See United States ex rel. Rosen v. Follette, 409 F. 2d 1042 (2d Cir. 1969) cert. den. 398 U.S. 930 (1970); United States ex rel. Rizzi v. Follette, 367 F. 2d 559 (2d Cir. 1966).

Petitioner misreads Saddler v. United States, supra, when he claims it adopted the holding of Sieling v. Eyman, 478 F. 2d 211 (6th Cir. 1973) requiring a higher standard of competency to plead guilty than to stand trial. In Saddler, the Court remanded for a competency hearing pursuant to

18 U.S.C. § 4244, which is a proceeding to determine competence to stand trial. It would be anomalous indeed, if the Court expected that a finding of whether the defendant was able to understand the proceedings against him and assist in his defense would necessarily include a finding about some undefined higher competence.\*

Equating the standard for competency to stand trial with the level required for pleading guilty has been almost uniformly and historically accepted as the applicable law. Note, Competence to Plead Guilty: A New Standard, 74 Duke Law Journal 149, 155; Dusky v. United States, 362 U.S. 402 (1959); Criminal Procedure Law § 703.10; former Code of Criminal Procedure § 662; United States v. Mercado, 469 F. 2d 1148 (2d Cir. 1972); United States v. Valentino, 283 F. 2d 634 (2d Cir. 1960).

Petitioner, however, believes that this was the wrong standard. Petitioner erroneously believe that this Court has adopted the position taken recently by the Ninth Circuit, namely that the standard for competence to plead guilty is higher than the standard for competence to stand trial. As we have shown this is not so and there is no tenable basis for such legal argument.

\* Just months before Saddler, this Circuit refused to decide whether it would adopt the Sieling standard. United States ex rel. Putman v. Henderson, 525 F. 2d 683 (2d Cir. 1975).

Sieling v. Eymann, supra, is based on the theory that a guilty plea involves a waiver of multiple rights, and purports to find authority in Westbrook v. Arizona, 384 U.S. 150.

In Westbrook, the accused, who was charged with murdering a lawyer, was found after a competency hearing competent to stand trial. The defendant then waived counsel and proceeded to conduct his own defense. The United States Supreme Court, in a very short opinion, reversed and remanded because there was no hearing or inquiry into the defendants' competence to waive his constitutional right to counsel and proceed to conduct his own defense.

Westbrook did not state that there was a different standard or degree of competence required to waive counsel and proceed pro se. It follows that Westbrook similarly did not enunciate a separate standard or degree of competence to plead guilty. Indeed, Westbrook did not even mention guilty pleas. Westbrook stands only for the proposition that where a defendant's competency has already been put in issue by a mental examination and the defendant then announces a wish to waive counsel and proceed pro se, a further inquiry must be held. Nothing was said about a new standard to be used in that inquiry.

The Supreme Court never indicated how Westbrook's second competency hearing should differ from the first. If the Supreme Court had intended to announce a new standard in Westbrook it would surely have announced what that standard was. On the basis of Westbrook, therefore, it is impossible to presume a new competency standard. Thus the Ninth Circuit was completely mistaken in expansively reading Westbrook to imply a separate and higher standard of competence for guilty pleas. The correct reading of Westbrook limits its holding to cases where, as in Westbrook, a defendant found competent to stand trial after examination then announces he wishes to proceed pro se, Splitt v. United States, 364 F. 2d 594 (6th Cir. 1966), cert. den. 385 U.S. 1019, in which case a new inquiry (but not a new standard) is required.

Petitioner implies that this Court accepted new standard of mental competence in Saddler, but gives no indication as to how, as a practical matter, this competence is to differ from the present standard of competence, except that the new standard should be "higher". Fine differences in level and degrees of competence, however, may not even be scientifically ascertainable. The uncertainties and tentativeness of psychiatric judgments, a problem long recognized by

the Supreme Court, Greenwood v. United States, 350 U.S. 366, 375 (1956), already presents sufficient difficulties without the necessity of compounding them by adding new degrees of competence.

Petitioner nowhere indicates why the present mental competence standard is insufficient to determine competence to plead guilty. In fact there is no basis for supposing that a defendant with the mental competence to stand trial does not also possess the mental competence to participate in proceedings of other kinds, such as a guilty plea. To suggest that a higher standard of competence is necessary because a guilty plea waives multiple rights is a complete non-sequitur. It also condemns a certain class of defendants to a limbo where they may be competent to go to trial but be prohibited from pleading guilty.

This Court should reject such an untenable approach. No other Circuits have adopted it. Other Circuits have already rejected it. United States ex rel. McGouch v. Hewitt, 528 F. 2d 339 (3d Cir., 1975) at 342, n. 3; Malinauska v. United States, 505 F. 2d 649 (5th Cir. 1974); Crail v. United States, 430 F. 2d 459 (10th Cir. 1970); Wolf v. United States, 443 (10th Cir. 1970); United States v. Betterhausen, 499 F. 2d 1223 (10th Cir. 1974); United States v. Harlan, 480 F. 2d 215 (6th Cir. 1973). The Ninth Circuit's approach has been

sharply and persuasively criticized. Note, Competence to Plead Guilty: A New Standard, 1974, Duke Law Journal 149.

In sum, it is beyond belief that petitioner, who although a borderline defective was not retarded, who was honorably discharged from the Air Force, and who had no history of mental illness was incompetent to plead guilty. Indeed, he entered a plea of guilty to a tax charge before the United States District Court for the Southern District of New York after Dr. Portnow's report suggested that his intelligence be tested. The result sought for by petitioner as to the state conviction would indeed be anomalous.

#### CONCLUSION

THE ORDER OF THE DISTRICT COURT  
SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York  
July 8, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondent-  
Appellee

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

DAVID L. BIRCH  
Assistant Attorney General  
of Counsel

SUPREME COURT  
COUNTY OF BRONX

SPECIAL AND TRIAL TERM PART XII

275, 3057

THE PEOPLE OF THE STATE OF  
NEW YORK

against

ROOSEVELT BENTLEY

Defendant

File Number.....19. 69  
Motion for vacate, judgment  
Aug. 1 72  
Submitted.....19.....  
Argued.....19.....

Present: SAMUEL J. SILVERMAN

Hon..... J. S. C.

FILED

AUG 4, 1972

SUPREME COURT CLERK'S OFFICE  
BRONX COUNTY

	Papers Numbered
Notice of Motion and Affidavit Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	2
Answering Affidavits.....	
Replying Affidavits.....	
Exhibits.....	

## Stenographer's Minutes

The defendant pleaded guilty to the crime of possession of a weapon as a felony under indictment 2525-69 and criminal possession of a dangerous drug ~~under indictment 2525-69~~ in the third degree to cover indictment No. 3057-69. He was sentenced on April 24, 1970 to a term of seven years on each charge, the sentences to run concurrently. The conviction was affirmed on appeal (32 A D 2d 690). His application for a writ of error coram nobis was denied by another justice and this determination was affirmed by the Appellate Division in the same decision. He now moves to vacate the judgment on the ground that he was mentally incompetent at the time the plea was entered. In support of his motion, he quotes from a purported psychiatric report based on an examination at the Federal House of Detention made on March 2, 1971 in connection with an unrelated case which in essence states that he was suffering from some degree of mental retardation and psychological tests should be made to determine his intelligence quotient. This unauthenticated report provides no basis for relief. The fact that a defendant may suffer some form of mental retardation does not make him either mentally diseased or mentally defective. The minutes of pleading show that this defendant competently and intelligently entered the guilty plea. He has had a long history of involvements with the law and there is no basis for a hearing on the ground that the defendant was either mentally incompetent or mentally defective at the time of pleading and sentence. He is presently incarcerated at the Auburn Correctional Institution which is a state prison and not a mental hospital. He has not demonstrated that he ever was confined in a mental institution, nor that he was given psychiatric treatment either before or after these convictions. At the time the defendant entered his guilty pleas, there was no basis on which the court should have ordered a sanity hearing and there was no request for the same (People v. Smyth, 3 N.Y. 2d 184). The probation report at the time of sentence stated "He impresses as of average intelligence." The defendant has failed to sustain the burden of showing that he is entitled to a hearing, as the supporting affidavit lacks factual support (People v. White, 309 N.Y. 636, 641).

The motion is denied in all respects.

Opinion filed herewith.

Dated Aug 4 1972

People's Brief.....

Defendant's Brief.....

J. S. C.

Appendix 1

BEST COPY AVAILABLE

70 CRIM. 259

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	<del>vs. U.S.</del> T.26, U.S.C., Sec. 7201
vs.	
	Unlawfully failing to make
	an income tax return for the
	calendar year 1963 to the District
ROOSEVELT CLIFFORD BENTLEY	Director of I.R.S; within required
	time. (T.18, U.S.C. (Ct. 1))
	T.26, U.S.C., Section 7201
	<del>REPEATEDLY</del> T.18, U.S.C., Sec. 2
	Unlawfully attempting to evade
	& defeat a large part of the
	income tax for the calendar year
	1964. ( Ct. 2).
	(TOTAL - TWO COUNTS)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC	DISB.
J.S. 2 mailed ✓	Clerk				
J.S. 3 mailed ✓	Marshal				
Remington Comp. # 56651	Docket fee				
William B. Gray, AUSA					
Title					
Sec.					

DATE	PROCEEDINGS
1-9-70	Filed Indictment and Notice of Assignment of case to Judge Edelstein pursuant to Rule 2(c) of the General Rules of this Court.
4-17-70	Filed Aff. for W/H/C/ AD PROS. and Writ issued. Ret. 4-29-70.
4-29-70	Produced in court on writ, Pleading adj. to 5-8-70 at 10:30 a.m. Deft. ordered fingerprinted. EDELSTEIN, J.
5-13-70	Produced in court on writ, Pleads NOT GUILTY (atty present) Motions & trial date 6-30-70 at 10:30 a.m. Rm. 618. EDELSTEIN, J.
5-26-70	Filed M.R. on writ, writ <del>executed</del> 4-21-70, satisfied.
6-25-70	Filed Affdvt. for W/H/C Ad. Pros. Writ issued, Ret. 7-1-70.
7-29-70	Filed Notice of Motion for Discovery and inspection. Ret. 8-4-70.
8-17-70	Filed transcript of record of proceedings dtd. 4-29-70.

Appendix "2"

DATE	PROCEEDINGS
12-1-70.	Filed affidavit for writ of habeas corpus ad prsequendum. iss. and ret. 12-4-70.
12-3-70	Filed W/H/C ad pros. writ satisfied 11-24-70. COOPER, J.
12-22-70	Filed Transcript of record of proceedings, dated 10-6-70
1-25-71	Filed affdvt. of William B. Gray, AUSA for writ of habeas corpus- writ issued ret. 1-28-71.
APR 19 1971	Filed Transcript of record of proceedings, dated 12-18-70
4-27-71	Filed affidavit of William B. Gray AUSA for a writ of habeas corpus ad pros. Issued writ. ret. 4-30-71.
4-29-71	Filed affidavit of William B. Gray AUSA for writ of habeas corpus ad pros. Issued writ. ret. 5-7-71.
5-3-71	Filed order appointing Dr. Emanuel Fisher to examine & test deft. at detention facilities of US Marshal or FDH. EDELSTEIN, J. (Notice mailed)(3 certified copies delivered to Ct. US Marshals
5-12-71	<i>Def't Petition for Writ of Habeas Corpus, writ vacated 4-29-71</i> <i>Def't was transferred to Auburn Prison.</i>
5-24-71	Filed Govt's notice of readiness for trial. EDELSTEIN, J.
2-25-72	Filed Affidavit of William B. Gray, for writ of habeas corpus. Issued writ ret. 3-6-72
3-24-72	Filed CJA form 3A-affidavit of financial status(sent to Edelstein, Ch. J)
5-16-72	Def't. PLEADS GUILTY to count 1 only..Atty. present....
5-16-72	Filed Judgment(Atty. present)Def't produced in Court on A Writ of H/C...The def't is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of SIX(6)MONTHS on count 1. The Court recommends that the Atty General pursuant to Section 4082 of T1.18, U.S. Code, arrange to have this sentence served concurrently with the sentence def't is presently serving at Auburn State Prison, Auburn, New York. Count 2 dismissed on motion of def't's counsel with consent of the Govt.....EDELSTEIN, CH. J. Issued commitment and copies.....
6-13-72	<i>Def't Petition for Writ of Habeas Corpus satisfied 5-16-72</i>
SEP 2 1972	Filed Transcript of record of proceedings, dated 5-16-72
9-5-72	Bentley-Filed def'ts letter for a request for a free copy of <del>the</del> transcript of the plea and sentence, and filed memo endorsed "Def'ts mot for a free transcript is denied So Ordered Edelstein, J.
1-8-73	<i>Filed Commitment &amp; entered return, Def't. Delivered to the Atty. Gen.</i>

BEST COPY AVAILABLE

STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

David L. Birch, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Respondent herein. On the 8<sup>th</sup> day of July, 1976, he served the annexed upon the following named person :

David J. Gottlieb, Esq  
Legal Aid Society  
Federal Defenders Service Unit  
509 United States Courthouse  
Foley Sq  
NY, NY 10007

Attorney in the within entitled ~~for~~ appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

David L. Birch

Sworn to before me this  
8<sup>th</sup> day of July, 1976

Wm. L. Hughes  
Assistant Attorney General  
of the State of New York